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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MICHAEL M. CARNEY,

Plaintiff and Appellant,

v.

U.S. BANK, N.A., as Trustee, etc., et al.,

Defendants and Respondents.

G050376

(Super. Ct. No. 30-2013-00673776)

O P I N I O N

Appeal from a judgment and order of the Superior Court of Orange County,  
Frederick Paul Horn, Judge. Affirmed.

Michael M. Carney, in pro. per, for Plaintiff and Appellant.

Green & Hall, Howard D. Hall, Michael E. Lisko and Markus D. Self, for  
Defendants and Respondents U.S. Bank, N.A., as Trustee, etc., Nationstar Mortgage LLC  
and Mortgage Electronic Registration Systems, Inc.

Severson & Werson, Jan T. Chilton, Michael G. Cross and Kerry W.  
Franich, for Defendants and Respondents Bank of America, N.A. and ReconTrust  
Company, N.A.

## INTRODUCTION

Appellant Michael Carney's lawsuit superficially resembles many others spawned by the housing crash of 2008. Like many other plaintiffs, he sued his lender, the assignee of his deed of trust (U.S. Bank), Mortgage Electronic Registration Systems, Inc. (MERS), the substituted trustee (ReconTrust Company), and loan servicers Bank of America (BofA) and Nationstar Mortgage (Nationstar), among others, alleging that because of the way the note and deed of trust on his home were packaged and sold, an assignment of deed of trust, a notice of default, and a notice of trustee's sale were wrongly recorded against his property. Unlike other plaintiffs alleging similar facts, however, Carney did not sue to halt foreclosure or for wrongful foreclosure. Instead, he alleged a series of common law and statutory causes of action having, with one exception, nothing to do with the Civil Code's non-judicial foreclosure statutes.

The trial court sustained demurrers to Carney's second amended complaint without leave to amend. As we explain in more detail below, Carney's appeal can go forward against only respondents U.S. Bank, MERS, and Nationstar. He failed to notice a timely appeal against BofA and ReconTrust, so the appeal as to these parties must be dismissed.

Carney devotes the bulk of his briefing on appeal to the issue of standing, that is, whether he can assert the rights of investors in a real estate trust that may or may not have purchased his debt or the rights of whoever holds his note and deed of trust instead of U.S. Bank. For the most part, this issue is irrelevant. Carney is asserting common law causes of action, like fraud and interference with contract, for which the analysis of standing is straightforward. Only one cause of action, for declaratory relief, directly implicates a question regarding Carney's standing.

Carney failed properly to allege facts supporting all the elements of the causes of action he asserted against U.S. Bank, MERS, and Nationstar. His declaratory relief cause of action in particular suffers from the same deficiency fatal to so many of

the lawsuits – state and federal – that have followed this pattern. That is, he is trying to assert the rights of investors in real estate vehicles, not his own rights. He has not shown us how he can amend his complaint. We therefore affirm the judgment dismissing the lawsuit against U.S. Bank, Nationstar, and MERS without leave to amend.<sup>1</sup>

## FACTS

Carney and his wife executed a deed of trust for \$637,500, secured by a home in Costa Mesa, in July 2005. The lender was Bondcorp Realty Services, Inc. First American Title Company was the trustee, and MERS was the lender’s nominee and beneficiary. Although Carney does not specifically allege his default, an exhibit he attached to the original complaint established that he ceased making loan payments at the end of 2008.

In July 2010, MERS recorded the assignment of the note and deed of trust to U.S. Bank, by means of a “Corporation Assignment of Deed of Trust.” U.S. Bank took the assignment as trustee for the certificateholders of SARM 05-19XS, a real estate trust. In May 2013, BofA, acting as attorney in fact for U.S. Bank, substituted ReconTrust as trustee in place of First American Title. ReconTrust then recorded a notice of default in the amount of \$212,746. A notice of trustee’s sale was recorded on

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<sup>1</sup> Carney has filed two requests for judicial notice in this court. In his first request, Carney has asked us to take judicial notice of a copy of his note attached to a letter. He does not identify any category listed in Evidence Code section 452 that applies to the note. It is not a public record, and it is not a fact or proposition that is of such common knowledge within the territorial jurisdiction of the court that it cannot reasonably be the subject of dispute. Carney wants us to notice that the submitted document does not include any endorsements to U.S. Bank. At best, this is only a copy of a copy of the note. There may be, and probably are, more intervening copies. It tells us nothing about the original note. The first request is therefore denied.

The second request asked us to take judicial notice of an uncertified copy of a filing in Carney’s Chapter 13 bankruptcy, of a brief by the California Attorney General in a case now pending before the California Supreme Court, and of a portion of the legislative history of what became Civil Code sections 2429.9 et seq., statutes enacted in 2012. We do not take judicial notice of uncertified copies of other courts’ actions, without some explanation for the absence of certification. (See *Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 743.) And even if we took judicial notice of the document, we could take notice only of the fact of its existence, not of the truth of any statements made in it. (See *Day v. Sharp* (1975) 50 Cal.App.3d 904, 914.) As to the other two documents, the brief is not judicially noticeable at all. The legislative history would be judicially noticeable if it were relevant to an issue in the appeal (see *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135, fn. 1), but it is not. We therefore deny the second request.

August 19 for a sale on September 11, 2013. The record does not reflect whether the sale took place, either in September or afterwards.<sup>2</sup>

Carney sought bankruptcy protection in March 2010. The case was dismissed in early 2011.

Carney filed an action in the United States District Court against BondCorp, MERS, BofA, and ReconTrust in April 2011 “for violations of law (TILA, RESPA) concerning the origination of the Deed of Trust and Promissory Note.” This case was dismissed in December 2012.

Carney, representing himself, filed his state-court complaint in September 2013, just days before the scheduled trustee’s sale. Some defendants demurred, and Carney filed a first amended complaint before the hearing. Defendants demurred again. The court sustained the demurrers with leave to amend.

The second amended complaint, the operative one here, alleged causes of action for declaratory relief, fraud, interference with contract, slander of title, negligent infliction of emotional distress, violation of Civil Code sections 1788 et seq. (Rosenthal Fair Debt Collection Practices Act), violation of Business and Professions Code section 17200 (Unfair Competition Law), and quasi-contract.<sup>3</sup> The trial court sustained demurrers to these causes of action without leave to amend.

## **DISCUSSION**

“In reviewing a judgment of dismissal after a demurrer is sustained without leave to amend, we must assume the truth of all facts properly pleaded by the plaintiff-appellant. Regardless of the label attached to the cause of action, we must examine a complaint’s factual allegations to determine whether they state a cause of action on any available legal theory. . . . [¶] We will not, however, assume the truth of contentions,

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<sup>2</sup> Carney’s opening brief implies that no sale has taken place.

<sup>3</sup> The second amended complaint also alleged causes of action for constructive fraud and accounting, both of which Carney later abandoned in the trial court.

deductions, or conclusion of fact or law and may disregard allegations that are contrary to the law or to a fact which may be judicially noticed.” (*Daily Journal Corp. v. County of Los Angeles* (2009) 172 Cal.App.4th 1550, 1554-1555.) We affirm a judgment based on the sustaining of a demurrer on any properly supported ground, regardless of the trial court’s reasons. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 111; see *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 18-19.)

We review the refusal of the trial court to permit amendment after the sustaining of a demurrer for abuse of discretion. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 110.) The appellant must explain what the proposed amendments are and how they would cure the initial pleading deficiencies. (*Ibid.*)

We must first deal with an issue arising from the way the demurrers were handled in the trial court. The defendants demurred in two groups. Group One, consisting of Nationstar, U.S. Bank, and MERS, filed a notice of demurrer and memorandum of points and authorities. Group Two was made up of BofA and ReconTrust, which filed a motion to join the Group One demurrer. The trial court ruled on both groups’ issues in one minute order dated May 14, 2014. It sustained the Group One demurrers as to all causes of action without leave to amend. It granted the Group Two joinder motion, sustained the demurrer of ReconTrust on all causes of action without leave to amend, and sustained BofA’s demurrer to all but one cause of action (accounting) without leave to amend. Carney subsequently dismissed the accounting cause of action.

Group One submitted a judgment, which was signed and entered on June 5, 2014. Notice of entry of this judgment was served on June 20. Group Two’s judgment was filed and entered on September 25, and a notice of entry of judgment was served on October 14, 2014.

Although Carney's notice of appeal, filed on July 3, 2014, was vague about the defendants involved, it was clear about what he was appealing from.<sup>4</sup> He appealed from the judgment of dismissal entered on June 5. The June 5 judgment of dismissal covered only Nationstar, U.S. Bank, and MERS. The judgment of dismissal for BofA and ReconTrust was not entered until September 25, and the record does not contain a notice of appeal from that judgment.

A minute order sustaining a demurrer is not an appealable order; the appeal is from the subsequent judgment of dismissal. (*I. J. Weinrot & Son, Inc. v. Jackson* (1985) 40 Cal.3d 327, 331, superseded by statute on other grounds; *Lavine v. Jessup* (1957) 48 Cal.2d 611, 614; *Lopez v. Brown* (2013) 217 Cal.App.4th 1114, 1133; *Estate of Dito* (2011) 198 Cal.App.4th 791, 799; *ABF Capital Corp. v. Grove Properties Co.* (2005) 126 Cal.App.4th 204, 212.) On occasion, when someone neglects to put the final nail in the coffin by entering a formal judgment, an appellate court may deem the order sustaining the demurrer to incorporate a final, appealable, judgment of dismissal. (See, e.g., *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1395-1396.) In this case, however, the trial court entered a formal judgment of dismissal in favor of BofA and ReconTrust, so no deeming is necessary. Because Carney did not file a timely notice of appeal from this judgment, the appeal concerning these two parties must be dismissed.

We now turn to whether Carney has stated causes of action against Nationstar, MERS, and U.S. Bank.<sup>5</sup> As stated above, the lengthy discussion of standing

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<sup>4</sup> The notice of appeal states, "Notice is hereby given that Michael M. Carney appeals from the Judgment of Dismissal of this court after an order sustaining a demurrer by named defendants/respondents above entered on June 5, 2014 and the May 14, 2014 order of the court sustaining the demurrer(s) of the named defendants/respondents without leave to amend."

<sup>5</sup> Strictly speaking, Carney has waived claims of error as to all of his causes of action except declaratory relief. His 47-page opening brief devotes two pages to the other causes of action, addresses them in a most cursory and offhand fashion, and does not cite a single authority for the proposition that he has adequately alleged them. His reply brief does not address them at all. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.)

that occupies appellant's briefs is largely beside the point. Except for declaratory relief, Carney's causes of action do not implicate anyone's rights but his own. To put it another way, if someone defrauded him, he has standing to sue for fraud. Likewise, if someone interfered with his contract, he has standing to complain about it. The question is, instead, whether he properly alleged all the elements of each cause of action.

To recap the roster, MERS was the beneficiary of the original deed of trust and the lender's nominee. MERS assigned the deed of trust to U.S. Bank in June 2010. U.S. Bank, through BofA, substituted ReconTrust as the trustee in May 2013. Nationstar, according to the allegations of the complaint, succeeded BofA as the servicer of Carney's loan.<sup>6</sup>

## **I. Fraud**

Carney alleged this cause of action against U.S. Bank, BofA, MERS, and ReconTrust. As stated above, the appeal as to BofA and ReconTrust is dismissed. We therefore examine the allegations as they pertain to U.S. Bank and MERS.

The elements of a cause of action for fraud are misrepresentation of a material fact, knowledge of falsity, intent to deceive, justifiable reliance, and resulting damages. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 481.) Fraud must be pleaded with specificity. (*Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 776 [every element must be specifically pleaded].)

Carney alleges the following misrepresentations made by U.S. Bank and MERS: MERS "claimed to have had certain authority and interest in [Carney's] Note(s)<sup>7</sup> and [deed of trust]."<sup>8</sup> MERS effected a transfer of Carney's note(s) and deed of trust.

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<sup>6</sup> Nationstar is also allegedly the "Master Servicer" of a real estate trust to which Carney asserts his note and deed of trust were not properly transferred.

<sup>7</sup> The reference to "Note(s)" is obscure. Carney alleged only one note in the second amended complaint.

<sup>8</sup> This vague statement is certainly true. MERS was indisputably the original beneficiary of the deed of trust and the original lender's nominee.

U.S. Bank gained an interest in Carney's note(s) and deed of trust. Nationstar had authority to make demands and claims as to Carney's note(s) and deed of trust.

Assuming these representations were false and made with knowledge of falsity, several elements are still missing. Carney failed to allege that respondents intended to deceive *him* (as opposed to someone consulting documents in the Orange County recorder's office) by making the misrepresentations. He failed to allege how he relied on them to his detriment. He also alleged no resulting damages. He alleged only that (1) he was deprived of the benefits (unspecified) of the contract(s), (2) he would have had more options (unspecified) available to him, (3) he would have been able to negotiate with the real owner of the note (for what unspecified, outcome unspecified), (4) he would not have suffered distress, and (5) he would have "not incurred other damages and been prevented [*sic*] options available to him." The causal connection between the alleged misrepresentations and these "damages" is left completely to the imagination. (Cf. *Rossberg v. Bank of America, N.A.* (2013) 219 Cal.App.4th 1481, 1499-1500 [failure to allege connection between reliance and damages].) The demurrer to this cause of action was properly sustained.

## **II. Interference with Contract**

Because the appeal against BofA is dismissed, the only remaining respondent for this cause of action is U.S. Bank. The elements of a cause of action for interference with contract are: (1) a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) intentional acts designed to induce a breach of contract or disruption of the contractual relationship; (4) actual breach or disruption; and (5) resulting damage. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55.)

The contracts Carney identifies as the relevant ones are the note and the deed of trust. The parties to these contracts are Carney, his wife (as to the deed of trust), and BondCorp. The party allegedly interfering with these contracts was BofA, which

caused U.S. Bank to accept a fraudulent assignment of Carney's note and deed of trust. As a result, according to Carney, he never found out who the true "Noteholder" was.

To the extent this is comprehensible, it does not state a cause of action for interference with contractual relations against U.S. Bank. The bank is the assignee of Carney's original lender and is therefore a party to the note and trust deed. A party cannot tortiously interfere with its own contract. (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514.) If Carney means U.S. Bank interfered with his relationship with a hypothetical "Noteholder," this relationship exists only in Carney's imagination. Assuming such an entity existed, the contractual relationship between them would entail Carney making payments on his loan and fulfilling the other obligations the deed of trust imposed on him as the occasion arose.<sup>9</sup> Carney did not allege that U.S. Bank induced him to skip these payments or to forsake his other obligations; even if this had occurred, the injured party would be the Noteholder, not Carney. He has likewise alleged no contractual obligation of the Noteholder with which U.S. Bank has interfered to Carney's detriment. The demurrer was properly sustained as to this cause of action.

### **III. Slander of Title**

A cause of action for slander of title requires pleading and proof of a false and unprivileged publication that causes pecuniary loss. (*La Jolla Group II v. Bruce* (2012) 211 Cal.App.4th 461, 472.)

Carney limits the defendants in this cause of action to U.S. Bank and MERS and identifies only the "Corporate [*sic*] Assignment of Deed of Trust" as the "slandorous" publication. He alleges that this publication was executed and filed "by a [BofA] employee acting with color of authority [*sic*] from MERS." The Corporation

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<sup>9</sup> For example, the deed of trust obligated Carney to maintain the property that was security for the note.

Assignment of Deed of Trust was recorded in the Orange County official records on July 7, 2010.

A cause of action for slander of title must be brought within three years. (Code Civ. Proc., § 338, subd. (b).) It accrues when the plaintiff reasonably could be expected to discover the claim's existence. (*Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230.) Carney alleged he became aware of the assignment to U.S. Bank in August 2010, when the bank moved for relief from the automatic stay in his Chapter 13 bankruptcy.

The original complaint, filed September 6, 2013, does not contain a cause of action for slander of title. The record does not include a copy of the first amended complaint. The second amended complaint, which does include slander of title, was filed on March 3, 2014. Even if the cause of action related back to the original complaint, it would still be time-barred.

Moreover, Carney has alleged no facts showing how he was damaged by the recording of the assignment. A cause of action for slander of title requires a plaintiff to allege the particular financial loss caused by the false publication. (*Burkett v. Griffith* (1891) 90 Cal. 532, 537; *Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 Cal.App.4th 1040, 1057.) Carney made no such allegation. The demurrer to this cause of action was properly sustained.

#### **IV. Negligent Infliction of Emotional Distress**

“[T]here is no independent tort of negligent infliction of emotional distress. [Citation.] The tort is negligence, a cause of action in which a duty to the plaintiff is an essential element. [Citations.]” (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984-985.) The second amended complaint alleged this cause of action against all defendants, in general terms.

“The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate cause between the breach and

(4) the plaintiff's injury.” (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339.) “The existence of a duty of care owed by a defendant to a plaintiff is a prerequisite to establishing a claim for negligence.” (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1095.)

A duty of care has two general types. These are, first, a person's duty to use ordinary care when harm might reasonably be anticipated and, second, an affirmative duty where a person has a particular relationship to others. (*McGettigan v. Bay Area Rapid Transit Dist.* (1997) 57 Cal.App.4th 1011, 1016-1017.) ““In the first situation, [the defendant] is not liable unless he is actively careless; in the second, he may be liable for failure to act affirmatively to prevent harm.’ [Citation.]” (*Id.* at p. 1017.) If there is no duty, however, “the defendant's care, or lack of care, is irrelevant.” (*Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.* (1996) 49 Cal.App.4th 472, 482.)

Carney has alleged no facts establishing a duty of care owed to him by MERS, Nationstar, or U.S. Bank, the breaching of which caused him emotional distress. In general, lenders owe no duty of care to borrowers (*Nymark v. Heart Fed. Savings & Loan Assn.*, *supra*, 231 Cal.App.3d at p. 1096), and these respondents are even farther removed from Carney than a lender. U.S. Bank is the lender's assignee. Nationstar was alleged to have taken over BofA's position as loan servicer in 2013, but according to the information Carney provided, he has not made loan payments since the beginning of 2009. MERS was the original lender's nominee. Carney alleged no facts showing that any of these respondents exceeded their conventional roles. (See *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 205-208.)

To the extent this cause of action was a backdoor attempt to force parties contemplating a non-judicial foreclosure to prove their entitlement to foreclose, we discuss this issue in greater detail below. Here it is sufficient to observe that California's non-judicial foreclosure statutes do not require a foreclosing party to go beyond the statutory requirements of Civil Code sections 2924 et seq. either to effect a proper

foreclosure (see *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1155) or to defend its right to foreclose after the foreclosure has taken place. (See *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 270-272.) If Carney is trying to allege that U.S. Bank, MERS, and/or Nationstar had a “duty of care” not to record a notice of default or an assignment of deed of trust on his property because they lacked the authority to do so, this effort must fail in the absence of particular allegations going to the conditions for foreclosure set out in the Civil Code.

**V. Violation of Civil Code section 1788 et seq. (Rosenthal Fair Debt Collection Practices Act)**

Although the heading of this cause of action lists U.S. Bank as one of the defendants against which this cause of action is brought, the allegations themselves refer only to the actions of BofA and ReconTrust. As the appeal against both of these defendants has been dismissed, it is not necessary to analyze the allegations of this cause of action.

**VI. Quasi-Contract**

“The right to restitution or quasi-contractual recovery is based upon unjust enrichment. Where a person obtains a benefit that he or she may not justly retain, the person is unjustly enriched. The quasi-contract, or contract ‘implied in law,’ is an obligation (not a true contract . . . ) created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his or her former position by return of the thing or its equivalent in money.” (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 1013, p. 1102, italics omitted.)

Carney alleged that BofA unjustly enriched itself by demanding and accepting the payments he made on his loan, keeping the money for itself. The appeal against BofA has been dismissed, so it is not necessary to discuss the allegations of this cause of action further. Although the heading to this cause of action included U.S. Bank, Carney alleged no facts concerning any unjust enrichment by the bank.

## **VII. Violation of Business and Professions Code sections 17200 et seq.**

The defendants named in this cause of action are U.S. Bank, Nationstar, and MERS. Business and Professions Code section 17204 restricts private plaintiffs to those who have suffered injury in fact and have lost money or property as a result of the unfair competition.

The second amended complaint does not include any allegations of fact showing how Carney was injured in fact and lost money or property as a result of the actions of MERS, U.S. Bank, and/or Nationstar.<sup>10</sup> In his opening brief, he addresses this issue in less than half a sentence: “actual injury was properly pled.” That’s it. No argument, no citation to any authority. His reply brief ignores the cause of action entirely.

We are not required to search the record to ascertain whether it contains support for Carney’s contention. (See *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545.) “One cannot simply say the court erred, and leave it up to the appellate court to figure out why.” (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368.) In an opening brief that largely failed to discuss why the demurrers to most of the second amended complaint should not have been sustained, the treatment of this cause of action stands out as especially cavalier. We regard this issue as waived.

## **VIII. Declaratory Relief**

We now turn to the cause of action at the heart of Carney’s lawsuit, at least judging from the amount of space he devoted to the one dispositive issue – standing. Our task is considerably lightened by the thorough and comprehensive analysis provided in *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, in which the

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<sup>10</sup> Carney alleged the wrongful acts in bulk, without specifying which defendant(s) committed which wrongful act(s). The acts were: (1) executing false documents; (2) recording documents without legal authority; (3) failing to disclose the principal on recorded documents; (4) demanding and accepting payments not owed to them; (5) violating the Security First Rule; (6) reporting late payments to credit bureaus; (7) claiming to be a noteholder or beneficiary under the deed of trust; and (8) “other myriad deceptive practices and acts intended to deceive as alleged and described herein.”

plaintiff alleged facts and advanced arguments to support a declaratory relief cause of action that are virtually identical to Carney's allegations and arguments.

Carney discusses *Jenkins* in his opening brief in conjunction with *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 as representing a "split in authority." In reality, *Glaski* has been nearly universally rejected. (See, e.g., *Kan v. Guild Mortgage Co.* (2014) 230 Cal.App.4th 736, 744.) A look at Shepard's for *Glaski* reveals 100 cases criticizing or distinguishing it. No published case follows its holding that a borrower may challenge the authority of an assignee of a deed of trust to record a notice of default. Federal courts sitting in the Northern District of California have uniformly declined to follow *Glaski*. (See *Chen v. Deutsche Bank Nat'l Trust Co.*, 2014 U.S. Dist. LEXIS 164452 (N.D. Cal. Nov. 24, 2014) \*17-19.) Furthermore, even the courts in New York, upon whose law *Glaski* in part relies, have rejected its reasoning. (See *Sandri v. Capital One, N.A.* (N.D. Cal. 2013) 501 B.R. 369, 376-376.)

There is no "split in authority." There is the analysis represented by *Jenkins*, and there is the outlier, *Glaski*.

Jenkins alleged that "her loan was pooled with other home loans in a securitized investment trust . . . without proper compliance with the investment trust's pooling and service agreement." (*Jenkins, supra*, 216 Cal.App.4th at p. 505.) "[T]he failure to comply with the . . . agreement extinguished the security interest created by her execution of the deed of trust . . . and, therefore, Defendants now have no security interest to foreclose upon." (*Ibid.*) Carney alleged that the 2010 assignment of the deed of trust to U.S. Bank as trustee of a real estate trust is void because the trust closed five years before the assignment occurred. Therefore U.S. Bank has no interest in his deed of trust or his note.

Carney's case tracks the facts of *Jenkins* with almost eerie exactitude, so we discuss that case and quote from it at some length. In his declaratory relief cause of action, Carney alleged a controversy between himself on the one hand and U.S. Bank on

the other hand over his note and deed of trust.<sup>11</sup> He asked for a judicial declaration that U.S. Bank had no right, interest or claim in his note or deed of trust, had no right to collect mortgage payments, and had no right to enforce the terms of the note or deed of trust. As nearly as we can tell from the complaint, there is no pending foreclosure action, and there has been no notice of a trustee's sale.<sup>12</sup>

In *Jenkins*, we held that the plaintiff could not state a declaratory relief cause of action “because she cannot show an actual controversy exists between herself and Defendants. Code of Civil Procedure section 1060 authorizes ‘[a]ny person . . . who desires a declaration of his or her rights or duties with respect to another . . . in cases of *actual controversy relating to the legal rights and duties of the respective parties*, [to] bring an original action . . . for a declaration of his or her rights and duties . . . .’ (Code Civ. Proc., § 1060, italics added.) ““The fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject.” [Citation.]’ [Citation.] In order for a party to pursue an action for declaratory relief, the ““actual, present controversy must be pleaded specifically . . . .” [Citation.] Thus, a claim must provide specific facts, as opposed to conclusions of law, which show a ““controversy of concrete actuality.” [Citation.] Whether a claim presents an ““actual controversy’ within the meaning of Code of Civil Procedure section 1060 is a question of law that we review de novo.” [Citation.]’ [Citation.]

“ . . . Jenkins’s cause of action for declaratory relief is grounded on her assertion Defendants do not have a secured interest in her home to foreclose upon because of alleged noncompliance with the terms of the investment trust’s pooling and

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<sup>11</sup> The heading included MERS, but the cause of action alleged no facts regarding a controversy between Carney and MERS and asked for no declaration regarding MERS. He requested punitive damages against both U.S. Bank and MERS, but punitive damages are not available for declaratory relief. (See *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 961 [punitive damages require tort and finding of oppression, fraud, or malice].)

<sup>12</sup> In his opening brief, however, Carney alludes to a new notice of default recorded by Nationstar in September 2014. Carney has not asked us to take judicial notice of this latest notice of default.

servicing agreement when her loan was purportedly pooled with other home loans and securitized. In her complaint, and again in her opening brief, Jenkins asserts that an actual controversy exists between herself and Defendants as to whether Defendants have an enforceable secured interest in her home. We disagree.

“Jenkins acknowledges in both her SAC and opening brief that she executed both a promissory note . . . and a deed of trust securing her debt . . . . Consequently, there is no dispute between the parties as to the existence of the secured home loan debt. There is also no dispute the deed of trust contains (1) an explicit power of sale clause in favor of the beneficiary-creditor; (2) provisions setting forth Jenkins’s obligations with regard to repaying the loan and maintaining the property; and (3) provisions stating the beneficiary-creditor may transfer the promissory note at any time without providing notice of the transfer to Jenkins.

“[¶] . . . [¶]

“Despite these facts, Jenkins’s first cause of action attempts to construct a dispute between herself and Defendants with regard to the alleged improper transfer of the promissory note during the securitization process. However, even if the asserted improper securitization (or any other invalid assignments or transfers of the promissory note subsequent to her execution of the note on Mar. 23, 2007) occurred, the relevant parties to such a transaction were the holders (transferors) of the promissory note and the third party acquirers (transferees) of the note. ‘Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely substituted one creditor for another, without changing her obligations under the note.’ [Citation.] As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, Jenkins lacks standing to enforce any agreements, including the investment trust’s pooling and servicing agreement, relating to such transactions. [Citation.]

“Furthermore, even if any subsequent transfers of the promissory note were invalid, Jenkins is not the victim of such invalid transfers because her obligations under the note remained unchanged. Instead, the true victim may be an individual or entity that believes it has a present beneficial interest in the promissory note and may suffer the unauthorized loss of its interest in the note. It is also possible to imagine one or many invalid transfers of the promissory note may cause a string of civil lawsuits between transferors and transferees. Jenkins, however, may not assume the theoretical claims of hypothetical transferors and transferees for the purposes of showing a ‘controversy of concrete actuality.’ [Citation.] Consequently, we conclude Jenkins’s first cause of action lacks merit for the independent reason she cannot show the existence of an actual, present controversy between herself and Defendants. [Citations.]” (*Jenkins, supra*, 216 Cal.App.4th at pp. 513-515.)

Carney’s first cause of action for declaratory relief suffers from the identical infirmities. He acknowledged executing a deed of trust and note. His deed of trust, like Jenkins’, includes a provision allowing transfer of the note without notice to Carney. Although Carney does not explicitly allege that his loan is in default, he attached documents to his original complaint establishing that he ceased making loan payments in 2009, and he did not allege he cured the default or resumed making loan payments. “‘Where written documents are the foundation of an action and are attached to the complaint and incorporated therein by reference, they become a part of the complaint and may be considered on demurrer.’ [Citation.]” (*Qualcomm, Inc. v. Certain Underwriters At Lloyd’s, London, supra*, 161 Cal.App.4th at p. 191.) Like Jenkins, Carney seeks to create a controversy between himself and U.S. Bank based on an allegedly improper transfer of his note and deed of trust.<sup>13</sup>

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<sup>13</sup> His allegation that U.S. Bank cannot be the assignee of his trust deed because the real estate trust closed five years before the assignment has been rejected as the basis of both fraud and declaratory relief causes of action. (See *McLaughlin v. Wells Fargo Bank, N.A.* 2013 U.S. Dist. LEXIS 38864 (C.D. Cal. Mar. 19, 2013) \*17-19.)

Like Jenkins, Carney lacks standing to enforce any agreements regarding the sale of his note and deed of trust, and, like Jenkins, he is not the victim of any unauthorized or invalid transfers. His obligations under the note and deed of trust remain unchanged. If there is a noteholder out there who is not U.S. Bank, that person or entity and U.S. Bank can fight it out. Carney has not alleged that any such person or entity has materialized and is demanding loan payments from him.

Carney's argument on appeal that he has standing is extremely difficult to follow. He contends the certificateholders of the real estate trust of which U.S. Bank is the trustee invested in the trust to make money, so U.S. Bank owed them a duty not to cloud title to the property covered by the trust deeds in the corpus. U.S. Bank also owed them a duty not to claim the trust had an interest in property it did not have. From these observations, he concludes that *he* has standing to assert claims based on U.S. Bank's failure to perform its duties to the certificateholders: "[S]tanding' or 'rights' and its near cousin concept 'privity' under California law do not bar . . . Carney from relying on a contract (assignment, Trust agreements) to which he is not a party when he is asserting his own rights and not the rights of others." He appears to mean that he can rely on a breach of U.S. Bank's duty to the trust's certificateholders to provide him with a cause of action against U.S. Bank.

Carney relies on three cases as authority for this assertion: *Barrera v. State Farm Mut. Automobile Ins. Co.* (1969) 71 Cal.2d 659 (*Barrera*), *Connor v. Great Western Sav. & Loan Assn.* (1968) 69 Cal.2d 850 (*Connor*), and *Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980 (*Jasmine*).

*Barrera* dealt with the standing of a person injured by an insured driver to sue the driver's insurance company. After the insured put in a claim for an accident, the insurance company discovered he had lied about his driving record on his application form and rescinded the policy, leaving the injured person high and dry. (*Barrera, supra*, 71 Cal.2d at pp. 664-665.) The court held that the insurance company had a duty to the

public, as a matter of public policy, to investigate the driving records of its insureds within a reasonable time after issuing policies and rescind them at that point if there were irregularities – not two years later, *after* a claim had been made. (*Id.* at pp. 663, 667.)

The *Barrera* court repeatedly emphasized the “quasi-public” nature of the insurance business and the duty to the general public – not just to policyholders – owed by insurers. (*Barrera, supra*, 71 Cal.2d at pp. 669-673.) Thus, the insurance contract is unlike other kinds of contracts. “‘The purpose and nature of [life] insurance [contracts], and the duties which the insurer assumes under such contracts, and the manner in which such contracts are negotiated, impress such contracts and the relationship of the parties, even during the negotiations, with characteristics unlike those incident to contracts and negotiations for contracts in ordinary commercial transactions.’ [Citations.]” (*Id.* at p. 668, fn. 5.)

The court held that the insurer’s duty to investigate insurability promptly “inures primarily to the benefit of those members of the public who suffer injury from negligent motorists and seek recovery against the responsible tortfeasors.” (*Barrera, supra*, 71 Cal.2d at p. 674.) Therefore a person deprived of recovery because the insurer breached that duty has a cause of action against the insurer independent of contractual privity. (*Id.* at p. 675.)

Carney identifies no public policy comparable to the one articulated in *Barrera* that is implicated by the securitization of notes and deeds of trust. The duty of a trustee like U.S. Bank arises from a private transaction with the certificateholders. It does not inure to the benefit of strangers to the transaction. *Barrera* does not create a duty by U.S. Bank to Carney based on the provisions of the real estate trust.

In *Connor*, the court found that a lender was liable for negligence to persons who bought tract houses with major structural defects. The fact that the lender did not have a contractual relationship with the home buyers did not insulate it from negligence liability. The lender still had a separate duty – because of its heavy

involvement in the construction process – to protect the buyers from damages caused by the defects. (*Connor, supra*, 69 Cal.2d at pp. 865-866.) “[The lender] not only financed the development of the [housing] tract but controlled the course it would take. Had it exercised reasonable care in the exercise of its control, it would have discovered that the pre-packaged plans purchased by [the developer] required correction and would have withheld financing until the plans were corrected.” (*Id.* at p. 867.)

The issue in *Jasmine* was whether one company (Jasmine Networks) suing another for misappropriation of its trade secrets could continue to maintain the lawsuit after it had sold the rights to the trade secrets to a third party, retaining only its right to prosecute the lawsuit. (*Jasmine, supra*, 180 Cal.App.4th at pp. 987-988.) The court held that Jasmine had the necessary standing to continue with the trade secret action, finding that there was no such ““current ownership rule”” as the one advanced by the defendants. (*Id.* at p. 997.) The court discussed standing at some length (*id.* at pp. 990-992), concluding that absent special circumstances – such as a specific legislative grant – a party does not have standing to assert rights that belong only to another person. (*Id.* at p. 992.)

None of these cases establishes Carney’s standing to sue U.S. Bank for declaratory relief, in that none of them provides him with the “actual controversy” needed for such a cause of action. (See Code Civ. Proc., § 1060.) The code section excludes from the cause of action a declaration of rights under a trust, the terms of which Carney asserts establish his standing against U.S. Bank for failing in its duties to the certificateholders. And none of these cases supports a departure from the statutory prohibition. There is no public policy comparable to the policy articulated in *Barrera* that allows a borrower to enforce the rights of these parties, simply by virtue of his status as a borrower. *Connor* represents a departure from the general rule that “a financial institution owes no duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of

money.” (*Nymark v. Heart Fed. Savings & Loan Assn.*, *supra*, 231 Cal.App.3d at p. 1096.) That departure was justified by the lender’s heavy involvement in the details of construction and financing. Carney alleged no such involvement by U.S. Bank in his loan transaction, and *Jasmine* actually supports U.S. Bank’s position – that Carney cannot sue to enforce rights belonging only to the certificateholders of the real estate trust of which U.S. Bank is a trustee or of some other party damaged by improper or faulty transfers of debt instruments.

Although Carney has not specifically asked to halt a foreclosure, or claimed that respondents wrongly foreclosed, potential foreclosure is certainly lurking close by. Carney’s briefs repeatedly allude to respondents’ right to foreclose or to “enforce” the deed of trust, and there is no immediate explanation for his insistence that the assignment to U.S. Bank is void other than his desire to forestall the bank’s ability to foreclose. He has not, for example, alleged that anyone else has come forward demanding loan payments from him or that a potential sale may fall through because of uncertainty about the identity of the holder of the deed of trust. His emphasis on the allegedly improper recording of notices of default and a notice of trustee’s sale reinforce the conclusion that avoiding an eventual foreclosure is the driving force behind his lawsuit.<sup>14</sup>

For this reason, Carney’s arguments about the lack of evidence of the transfer of his note do nothing to establish a controversy between him and U.S. Bank. It is well established that a foreclosing entity in a non-judicial foreclosure does not have to produce the note or even present evidence that it has the note. (*Siliga v. Mortgage Electronic Registration Systems, Inc.* (2013) 219 Cal.App.4th 75, 84, fn. 5; *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440; *Gomes v. Countrywide Home Loans, Inc.*, *supra*, 192 Cal.App.4th at pp. 1154-1155.) Even if

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<sup>14</sup> The plaintiff in *Jenkins* was not facing an imminent foreclosure either. (*Jenkins*, *supra*, 216 Cal.App.4th at p. 504.) Nevertheless, we analyzed her causes of action as if the point of her lawsuit was to prevent a foreclosure. (*Id.* at p. 522.)

Carney is correct and the note was not properly transferred to U.S. Bank, the persons to complain about this failure are the investors in the trust, not Carney. His rights and obligations under the note are not affected by a faulty subsequent transfer.

Carney has not alleged facts showing that an actual controversy exists between him and U.S. Bank. The demurrer to the declaratory relief action was properly sustained.

**IX. Leave to Amend**

After a demurrer has been sustained, it is the plaintiff's burden to explain how the complaint can be amended to state a cause of action. (*Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, 95.) Carney does not address the individual causes of action in either of his briefs, let alone explain how he could remedy the defects in each one.

**DISPOSITION**

The appeal as to respondents ReconTrust Company and Bank of America is dismissed. The judgment of dismissal as to respondents U.S. Bank, MERS, and Nationstar is affirmed. Appellant's requests for judicial notice are denied. Respondents are to recover their costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.